

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL NEWBY,)	
)	No. CV-09-5084-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 18, 2011 (Ct. Rec. 20, 25). Attorney D. James Tree represents plaintiff; Special Assistant United States Attorney Richard Morris represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 7). On January 21, 2011, plaintiff filed a reply (Ct. Rec. 30). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment (Ct. Rec. 25) and **DENIES** plaintiff's motion for summary judgment (Ct. Rec. 20).

JURISDICTION

Plaintiff protectively applied for disability insurance benefits (DIB) and for supplemental security income (SSI) on June 26, 2006, alleging disability beginning April 30, 2004 (Tr. 104-

1 113). The applications were denied initially and on
2 reconsideration (Tr. 61-64, 66-69).

3 At a hearing before Administrative Law Judge (ALJ) Robert
4 Chester on February 10, 2009, plaintiff, represented by counsel,
5 and a vocational expert (VE) testified¹ (Tr. 35-56). On March 4,
6 2009, the ALJ issued an unfavorable decision (Tr. 20-30). The
7 Appeals Council considered additional evidence and denied Mr.
8 Newby's request for review on August 28, 2009 (Tr. 1-5).
9 Therefore, the ALJ's decision became the final decision of the
10 Commissioner, which is appealable to the district court pursuant
11 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
12 review pursuant to 42 U.S.C. § 405(g) on October 28, 2009 (Ct.
13 Rec. 1,4).

14 **STATEMENT OF FACTS**

15 The facts have been presented in the administrative hearing
16 transcript, the ALJ's decision, the briefs of both plaintiff and
17 the Commissioner, and are briefly summarized here.

18 Plaintiff was 53 years old at onset, 58 at the hearing, and
19 59 on the date of the ALJ's decision (Tr. 37, 104). He has a high
20 school education and a certificate in hotel (hospitality)
21 management (Tr. 38, 139). Mr. Newby has worked as a hotel clerk,
22 hotel manager, computer technician, and account clerk (Tr. 51-52,
23 134). He last worked in August 2007 as a hotel manager and was
24 fired after nine days for taking morphine to relieve pain (Tr. 38-
25

26 ¹The ALJ's decision erroneously states medical expert Arthur
27 Lorber, M.D., appeared and testified (Tr. 20). Although
28 scheduled, Dr. Lorber did not testify due to a medical emergency
(Tr. 37). The ALJ's error appears harmless.

1 39, 47-48). He was fired from a different hotel after three months
2 in April 2004 because pain made him irritable with guests (Tr. 39,
3 48).

4 Plaintiff sees a doctor every two months (Tr. 39-40). He uses
5 a prescribed back brace once or twice a week, and a cane once or
6 twice a month (Tr. 40-41). He cannot work because of pain,
7 headaches that last 24 hours, and memory problems caused by
8 morphine (Tr. 41-42).

9 Plaintiff alleges disability due to spinal fusion,
10 calcification, and scar tissue; bladder problems, and chronic
11 ulcer problems (Tr. 133). He lives alone, reads, watches
12 television, plays cards, cooks simple meals, cleans, does laundry,
13 and rakes leaves once a week. He feeds, bathes, and walks a dog.
14 Plaintiff has help with grocery shopping and sometimes borrows a
15 car. He can walk a mile about twice a month, stand 60-90 minutes,
16 and lift ten pounds. Plaintiff sleeps one hour at night and naps
17 during the day (Tr. 43-46, 142-145). He complained of depression
18 in 2006 (Tr. 147).

19 SEQUENTIAL EVALUATION PROCESS

20 The Social Security Act (the Act) defines disability as the
21 "inability to engage in any substantial gainful activity by reason
22 of any medically determinable physical or mental impairment which
23 can be expected to result in death or which has lasted or can be
24 expected to last for a continuous period of not less than twelve
25 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
26 provides that a Plaintiff shall be determined to be under a
27 disability only if any impairments are of such severity that a
28 plaintiff is not only unable to do previous work but cannot,

1 considering plaintiff's age, education and work experiences,
2 engage in any other substantial gainful work which exists in the
3 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
4 Thus, the definition of disability consists of both medical and
5 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
6 (9th Cir. 2001).

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled.
9 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
10 is engaged in substantial gainful activities. If so, benefits are
11 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
12 the decision maker proceeds to step two, which determines whether
13 plaintiff has a medically severe impairment or combination of
14 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

15 If plaintiff does not have a severe impairment or combination
16 of impairments, the disability claim is denied. If the impairment
17 is severe, the evaluation proceeds to the third step, which
18 compares plaintiff's impairment with a number of listed
19 impairments acknowledged by the Commissioner to be so severe as to
20 preclude substantial gainful activity. 20 C.F.R. §§
21 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
22 App. 1. If the impairment meets or equals one of the listed
23 impairments, plaintiff is conclusively presumed to be disabled.
24 If the impairment is not one conclusively presumed to be
25 disabling, the evaluation proceeds to the fourth step, which
26 determines whether the impairment prevents plaintiff from
27 performing work which was performed in the past. If a plaintiff is
28 able to perform previous work, that Plaintiff is deemed not

1 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
2 this step, plaintiff's residual functional capacity (RFC)
3 assessment is considered. If plaintiff cannot perform this work,
4 the fifth and final step in the process determines whether
5 plaintiff is able to perform other work in the national economy in
6 view of plaintiff's residual functional capacity, age, education
7 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
8 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

9 The initial burden of proof rests upon plaintiff to establish
10 a *prima facie* case of entitlement to disability benefits.
11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
12 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
13 met once plaintiff establishes that a physical or mental
14 impairment prevents the performance of previous work. *Hoffman v.*
15 *Heckler*, 785 F.3d 1423, 1425 (9th Cir. 1986). The burden then
16 shifts, at step five, to the Commissioner to show that (1)
17 plaintiff can perform other substantial gainful activity and (2) a
18 "significant number of jobs exist in the national economy" which
19 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
20 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

21 STANDARD OF REVIEW

22 Congress has provided a limited scope of judicial review of a
23 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
24 the Commissioner's decision, made through an ALJ, when the
25 determination is not based on legal error and is supported by
26 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
27 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9th Cir. 1999). "The
28 [Commissioner's] determination that a plaintiff is not disabled

1 will be upheld if the findings of fact are supported by
2 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
3 Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is
4 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
5 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
6 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
7 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
8 573, 576 (9th Cir. 1988). Substantial evidence "means such
9 evidence as a reasonable mind might accept as adequate to support
10 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
11 (citations omitted). "[S]uch inferences and conclusions as the
12 [Commissioner] may reasonably draw from the evidence" will also be
13 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
14 review, the Court considers the record as a whole, not just the
15 evidence supporting the decision of the Commissioner. *Weetman v.*
16 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
17 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

18 It is the role of the trier of fact, not this Court, to
19 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
20 evidence supports more than one rational interpretation, the Court
21 may not substitute its judgment for that of the Commissioner.
22 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
23 (9th Cir. 1984). Nevertheless, a decision supported by substantial
24 evidence will still be set aside if the proper legal standards
25 were not applied in weighing the evidence and making the decision.
26 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
27 433 (9th Cir. 1987). Thus, if there is substantial evidence to
28 support the administrative findings, or if there is conflicting

1 evidence that will support a finding of either disability or
2 nondisability, the finding of the Commissioner is conclusive.
3 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

4 **ALJ'S FINDINGS**

5 The ALJ found plaintiff was insured through March 31, 2011
6 for DIB purposes (Tr. 20, 22). At step one, he found plaintiff has
7 not engaged in substantial gainful activity since onset (Tr. 22).
8 At steps two and three, the ALJ found plaintiff suffers from the
9 medically determinable impairment of degenerative disc disease of
10 the lumbar spine (DDD), an impairment that is severe but does not
11 meet or equal a Listed impairment (Tr. 22, 24). The ALJ found
12 plaintiff less than fully credible (Tr. 26). At step four, relying
13 the vocational expert (VE's) testimony, he found plaintiff is able
14 to perform his past relevant work as a hotel clerk, hotel manager,
15 and account clerk (Tr. 30, 52-53). Accordingly, at step four the
16 ALJ found Mr. Newby is not disabled as defined by the Social
17 Security Act (Tr. 30).

18 **ISSUES**

19 Plaintiff contends the Commissioner erred when he weighed
20 the medical evidence and Mr. Newby's credibility, and when he
21 found plaintiff can perform his past relevant work (Ct. Rec. 21 at
22 7-8).

23 The Commissioner asserts the ALJ's decision is supported by
24 substantial evidence and free of legal error, and the Court should
25 affirm (Ct. Rec. 26 at 16, 18).

26 **DISCUSSION**

27 **A. Weighing medical evidence**

28 In social security proceedings, the claimant must prove the

1 existence of a physical or mental impairment by providing medical
2 evidence consisting of signs, symptoms, and laboratory findings;
3 the claimant's own statement of symptoms alone will not suffice.
4 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
5 on the basis of a medically determinable impairment which can be
6 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
7 medical evidence of an underlying impairment has been shown,
8 medical findings are not required to support the alleged severity
9 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
10 1991).

11 A treating physician's opinion is given special weight
12 because of familiarity with the claimant and the claimant's
13 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
14 1989). However, the treating physician's opinion is not
15 "necessarily conclusive as to either a physical condition or the
16 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
17 751 (9th Cir. 1989)(citations omitted). More weight is given to a
18 treating physician than an examining physician. *Lester v. Chater*,
19 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
20 given to the opinions of treating and examining physicians than to
21 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
22 (9th Cir. 2004). If the treating or examining physician's opinions
23 are not contradicted, they can be rejected only with clear and
24 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
25 ALJ may reject an opinion if he states specific, legitimate
26 reasons that are supported by substantial evidence. See *Flaten v.*
27 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
28 1995).

1 In addition to the testimony of a nonexamining medical
2 advisor, the ALJ must have other evidence to support a decision to
3 reject the opinion of a treating physician, such as laboratory
4 test results, contrary reports from examining physicians, and
5 testimony from the claimant that was inconsistent with the
6 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
7 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
8 Cir. 1995).

9 Plaintiff alleges the ALJ failed to properly credit the
10 opinions of treating doctor Angelika Kraus, M.D., and examining
11 doctor Meneleo Lilagan, M.D., and of J. Dalton, M.D., who signed a
12 medicaid certification in September 2006 (Ct. Rec. 21 at 11-14,
13 referring in part to Tr. 358, 384). The Commissioner asserts the
14 ALJ properly rejected these opinions in favor of the opinion of
15 another examining physician, Rosa Borders, M.D., the objective
16 medical evidence, and plaintiff's diminished credibility (Ct. Rec.
17 26 at 9-15).

18 Plaintiff assigns two additional errors: one, the ALJ should
19 have found Mr. Newby's headaches are a severe impairment, and two,
20 he erred by finding plaintiff is able to perform past work (Ct.
21 Rec. 21 at 10-11, 16-20). The Commissioner asserts plaintiff's
22 lack of consistent treatment and diminished credibility both
23 support the ALJ's step two determination (Ct. Rec. 26 at 7-11).
24 Last, the Commissioner asserts Mr. Newby failed to meet his burden
25 at step four (Ct. Rec. 26 at 16-17).

26 **B. Medical history**

27 The ALJ considered the records of treating physician Dr.
28 Kraus, who began treating plaintiff on July 20, 2005. On October

31, 2007, she opined Mr. Newby is permanently unable to work (Tr. 563), primarily due to back pain.

The ALJ considered the opinion of Dr. Borders, who examined plaintiff on April 4, 2007 (Tr. 435-438). She noted no abnormalities on exam and assessed no limitations (Tr. 438).

To further aid in weighing the conflicting medical evidence, the ALJ evaluated plaintiff's credibility and found him less than fully credible (Tr. 26). Credibility determinations bear on evaluations of medical evidence when an ALJ is presented with conflicting medical opinions or inconsistency between a claimant's subjective complaints and diagnosed condition. *See Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ must identify what testimony not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

The ALJ found plaintiff less than fully credible because

1 treatment has been conservative, daily activities are inconsistent
2 with the level of limitation claimed, and complaints are not
3 supported by clinical findings (Tr. 26, 28).

4 *Conservative treatment.* The ALJ notes although plaintiff has
5 received treatment for an allegedly disabling impairment,
6 treatment has been essentially routine and/or conservative. Since
7 onset plaintiff has had no epidural injections or facet blocks,
8 nor has he undergone physical therapy after onset in 2004. He has
9 not been referred for a surgical consultation (Tr. 27). Evidence
10 of "conservative treatment" is sufficient to discount a claimant's
11 testimony regarding severity of an impairment. *Parra v. Astrue*,
12 481 F.3d 742, 750-751 (9th Cir. 2007), citing *Johnson v. Shalala*,
13 60 F.3d 1428, 1434 (9th Cir. 1995).

14 *Daily activities.* Plaintiff's activities are not as limited
15 as one would expect given his claimed limitations. The ALJ
16 observes plaintiff shops, rakes or blows leaves with an air blower
17 for an hour once a week, cooks daily, does laundry, cleans, and
18 reads. He can walk a mile twice a month, and at other times, 150
19 yards at a time. Sitting causes no problem as long as he does not
20 stay in one spot too long. Plaintiff can stand 60-90 minutes as
21 long as he can walk around a little. Mr. Newby stated he can lift
22 and carry about ten pounds, as the ALJ notes (Tr. 26, 28). An ALJ
23 may properly reject a claimant's symptom testimony if the claimant
24 is able to spend a substantial part of the day performing
25 household chores or other activities that are transferable to a
26 work setting. *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9th Cir.
27 1996), citing *Fair v. Bowen*, 885 F.2d at 603.

28 *Lack of objective medical findings.* The ALJ points out the

1 objective evidence after onset reveals about the same level of
2 severity as before onset in April 2004. The fact that the
3 allegedly disabling impairment did not prevent him from working
4 "strongly suggests" it would not prevent current work (Tr. 26).

5 Plaintiff had back surgery in 1968 and began complaining of
6 back pain with radiating pain in 1998. The ALJ notes an MRI in
7 November 2002 showed a small amount of enhancement around the
8 thecal sac at L4-5 suggesting the presence of some fibrotic change
9 and slight narrowing of the spinal canal at L4-5 (Tr. 292). In
10 November 2003, plaintiff asserted facet blocks and epidural
11 injections gave no relief and the pain was worse, but he continued
12 to work. From November 2004 to July 2005, a period of eight
13 months, plaintiff sought no treatment. In July 2005 he complained
14 of radiating pain bilaterally and chronic weakness, but Dr. Kraus
15 notes patellar reflexes are 2+ and motor strength is 5/5 (Tr. 26,
16 406). In October 2005, plaintiff had normal range of motion in all
17 extremities (Tr. 26, Ex. 13F/4). An MRI in February 2007 showed
18 multilevel spinal canal narrowing significant at L2-3 where it was
19 mild to moderate with some crowding of the nerve roots; mild
20 spinal canal narrowing at L1-2 and L3-4; potential compromise of
21 the right L5 nerve root in the lateral recess, primarily from
22 facet arthropathy and ligamentum flavum hypertrophy (Tr. 26-27,
23 432-433). Dr. Borders' examination in April 2007 revealed good
24 balance and coordination. Sensory exam intact in the lower
25 extremities. Plaintiff had full ROM in all areas tested, including
26 the spine. Reflexes were 2+ throughout, motor strength was normal,
27 and there was no atrophy or weakness (Tr. 27, 437-438). A lack of
28 medical evidence does not support the disabling level of

1 limitation alleged (Tr. 26). A lack of supporting objective
2 medical evidence is a factor which may be considered in evaluating
3 an individual's credibility, provided that it is not the sole
4 factor. *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991).

5 The ALJ correctly relied on several factors, including
6 conservative and infrequent treatment for allegedly disabling
7 impairments, activities inconsistent with alleged degree of
8 impairment, and a lack of clinical support for alleged disabling
9 limitations when he found Mr. Newby less than completely credible
10 (Tr. 26).

11 The ALJ's reasons for finding plaintiff less than fully
12 credible are clear, convincing, and fully supported by the record.
13 See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)
14 (proper factors include inconsistencies in plaintiff's statements,
15 inconsistencies between statements and conduct, and extent of
16 daily activities). Noncompliance with medical care or unexplained
17 or inadequately explained reasons for failing to seek medical
18 treatment also cast doubt on a claimant's subjective complaints.
19 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603
20 (9th Cir. 1989).

21 **C. ALJ's assessment of medical opinions**

22 The ALJ gave Dr. Kraus's opinions little weight (Tr. 29). In
23 August 2006, she opined plaintiff was capable of sedentary work,
24 walked stiffly, and had decreased mobility (Tr. 397-398). The ALJ
25 points out these limitations were not mentioned elsewhere in the
26 treatment notes (Tr. 29, 395, Ex. 16F/4-7), and Dr. Kraus's
27 treatment notes contain very little objective information and a
28 lot of subjective complaints. Perhaps most importantly, the ALJ

1 observes Dr. Kraus's opinion that plaintiff can perform less than
2 sedentary work is not supported by Mr. Newby's daily activities or
3 his own admissions (Tr. 29). When confronted with conflicting
4 medical opinions, an ALJ need not accept a treating physician's
5 opinion that is conclusory and brief and unsupported by clinical
6 findings. *Tonapetyan v. Halter*, 242 F.3d at 1144, 1149 (9th Cir.
7 2001), citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
8 1992).

9 The ALJ relied on Dr. Borders' opinion because it is
10 supported by objective findings including normal ROM, 5/5 strength
11 in all extremities, no abnormality in gait or station, and MRI
12 results (Tr. 26). The ALJ is responsible for resolving ambiguity.
13 See *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 603 (9th
14 Cir. 1999). The ALJ's reasons for rejecting Dr. Kraus's
15 contradicted opinions are specific and legitimate. See *Andrews v.*
16 *Shahala*, 53 F.3d 1035, 1043 (9th Cir. 1995)(ALJ can legitimately
17 accord less weight to a medical opinion "premised to a large
18 extent upon the claimant's own accounts of his symptoms and
19 limitations" once those complaints have themselves been properly
20 discounted).

21 The ALJ rejected Dr. Lilagan's April 17, 2006, opinion
22 because the doctor notes plaintiff had difficulty bending and
23 twisting his trunk, and pain with straight leg raising, all
24 symptoms not mentioned anywhere else in the record (Tr. 29, 352-
25 355). Dr. Lilagan assessed an RFC for sedentary work (Tr. 356).
26 The ALJ opines plaintiff's ability to walk a mile and stand 60-90
27 minutes shows he is capable of more than sedentary work. The ALJ
28 also relied on Dr. Borders' contradictory exam results (Tr. 29).

1 The ALJ's reasons are specific, legitimate and supported by
2 substantial evidence.

3 The ALJ rejected Dr. Dalton's medicaid certification for
4 similar reasons, in that the assessed RFC for sedentary work is
5 contradicted by plaintiff's statements and Dr. Borders' exam
6 results (Tr. 29). The ALJ's reasons are fully supported. See e.g.,
7 *Tonepetyan*, 242 F.3d at 1144.

8 While another ALJ may have reached a different conclusion,
9 this ALJ's conclusion is supported by substantial evidence. Where
10 evidence is susceptible to more than one interpretation, the ALJ's
11 conclusion must be upheld. *Burch v. Barnhart*, 400 F.3d 676, 679
12 (9th Cir. 2005).

13 The ALJ properly weighed the medical evidence and plaintiff's
14 credibility.

15 **D. Step two**

16 Plaintiff claims headaches are a severe impairment (Ct. Rec.
17 21 at 10-11). The Commissioner notes the ALJ found plaintiff's
18 allegation he has headaches 24 hours a day is not supported by the
19 medical records (Ct. Rec. 26 at 8).

20 The Commissioner is correct. The ALJ observes before onset,
21 in November 2003, records show a medication prescribed for
22 headaches, topomax, is effective (Tr. 23, referring to Tr. 243).
23 Plaintiff did not complain of headaches again until February 2007,
24 and sought no treatment until December 2007 (Tr. 23, 429, 534).
25 The ALJ considered plaintiff's diminished credibility.

26 The ALJ is responsible for reviewing the evidence and
27 resolving conflicts or ambiguities in testimony. *Magallanes*, 881
28 F.2d at 751. It is the role of the trier of fact, not this court,

1 to resolve conflicts in the evidence. *Richardson*, 402 U.S. at 400.
2 The court has a limited role in determining whether the ALJ's
3 decision is supported by substantial evidence and may not
4 substitute its own judgment for that of the ALJ, even if it might
5 justifiably have reached a different result upon de novo review.
6 42 U.S.C. § 405(g).

7 The ALJ's step two finding is a reasonable interpretation of
8 the evidence.

9 **E. Step four**

10 Plaintiff asserts the ALJ erred at step four when he found
11 Mr. Newby is able to perform his past relevant work (Ct. Rec. 21
12 at 16-20). According to the Commissioner, the ALJ's analysis is
13 correct because he relied on a hypothetical that included all of
14 Mr. Newby's credible limitations (Ct. Rec. 26 at 17).

15 The Commissioner is correct.

16 The ALJ's hypothetical included plaintiff's credible
17 limitations, see *Magallanes v. Bowen*, 881 F.2d 747, 756-757 (9th
18 Cir. 1989), and the record supports the ALJ's determination,
19 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

20 Plaintiff's reliance on *Pinto v. Massanari*, 249 F.3d 840 (9th
21 Cir. 2001), is misplaced. The VE testified plaintiff is able to
22 perform his past relevant work as it is generally performed and
23 consistent with the DOT (Tr. 30).

24 Social Security Ruling (SSR) 82-61 sets out three tests to
25 determine whether a claimant retains the capacity to perform his
26 or her past relevant work. The job requirements are examined (1)
27 based on a broad generic classification of the job, (2) as the
28 claimant actually performed it, or (3) as the job is ordinarily

1 required [to be performed] by employers throughout the national
2 economy. The ALJ's finding that plaintiff is able to perform the
3 work as it is generally performed (Tr. 30) is supported by
4 substantial evidence. See e.g., *Listasio v. Shalala*, 47 F.3d 348,
5 350 (9th Cir. 1995) ("vocational experts can testify whether
6 particular applicants for disability benefits would be able to
7 perform subcategories of jobs within the DOT").

8 The ALJ's step four determination is fully supported by the
9 record and free of legal error.

10 CONCLUSION

11 Having reviewed the record and the ALJ's conclusions, this
12 court finds that the ALJ's decision is free of legal error and
13 supported by substantial evidence..

14 IT IS ORDERED:

15 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 25**) is
16 **GRANTED.**

17 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 20**) is
18 **DENIED.**

19 The District Court Executive is directed to file this Order,
20 provide copies to counsel, enter judgment in favor of defendant,
21 and **CLOSE** this file.

22 DATED this 16th day of March, 2011.

23 s/ James P. Hutton

24 JAMES P. HUTTON

25 UNITED STATES MAGISTRATE JUDGE